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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

REGINALD JELLS,

Petitioner

vs.

STATE OF OHIO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Reginald Jells, murdered Ruby Stapleton on April 18, 1987. He was arrested April 26, 1987; indicted for Aggravated Murder with a felony murder specification (death penalty), two counts of Kidnapping and one count of Aggravated Robbery on May 5, 1987; and arraigned on May 8, 1987.

Trial commenced before a three-judge panel on August 24, 1987 and concluded on August 31, 1987. The panel found Petitioner guilty of Aggravated Murder with felony specification and two count of Kidnapping. The Aggravated Robbery court was dismissed

by the State on August 27, 1987. After a mitigation hearing (September 17, 1987) Petitioner was sentenced to death on September 18, 1987.

STATEMENT OF THE FACTS

On April 18, 1987, at about 10:30 p.m., Ruby Stapleton and her son, Devon Stapleton (age 5) were kidnapped off the streets of Cleveland, Ohio, at the intersection of Lakeview and Euclid Avenue.

The kidnapping was witnessed and testified to by Owen Banks (R. 127-160), Edward L. Wright (R. 161-194), Camillia Banks (R. 218-247), and Devon Stapleton. (R. 83-124) All four witnesses identified Petitioner as the perpetrator of the kidnapping. (R. 94, 132, 168-169, 225)

The kidnapping took place on a warm, clear night; in a well-lighted area; in the presence of numerous witnesses; and without any attempt by Petitioner to conceal his identity.

All four witnesses identified the victim as the woman the petitioner picked up and threw into the van. (R. 97, 132, 169, 229)

All four witnesses identified the van used by the petitioner during the kidnapping. (R. 84, 134, 165-166, 224)

Edward L. Wright also identified Devon Stapleton as the little boy the petitioner picked off the street and put in the van, and he recalled a partial license plate number of the van. (R. 167, 170-171)

Owen Banks also noted that the van had a sign on it saying

"Keep on Vannin". He mistakenly remembered it as "Keep on Truckin". (R. 146)

Camilla Banks recorded the actual license number of the van - 149 MJV. (R. 223) That license number was listed to the defendant. (R. 288) (The petitioner, upon arrest, admitted the van was his). (R. 287)

All the witnesses testified that the kidnapping was a deliberate and forceful act by the petitioner. The victim, Ruby Stapleton, was not visibly injured at the time of the kidnapping. No witnesses saw any blood on her face or any signs of wounds.

The testimony of Devon Stapleton indicates that sometime earlier he and his mother were either forced into the petitioner's van by Petitioner, or that they entered Petitioner's van voluntarily. (R. 84) At about 10:30 p.m., the victim, Ruby Stapleton, escaped from the van causing Petitioner to stop the van and physically force her and Devon back into the van. (R. 85) That was the incident witnessed by numerous citizens.

After Devon and his mother were kidnapped, Petitioner proceeded to bludgeon Ruby Stapleton with some metal object, which rendered her unconscious and probably killed her. (R. 86-88) During the bludgeoning, his mother's blood splattered on Devon's clothes. (R. 87). The petitioner then drove to a junkyard (R. 89) where he stopped the van (leaving Devon inside), took the body of Ruby Stapleton out by way of the driver's door (R. 90), and carried her into the junkyard, abandoning her.

It is not certain whether Ruby Stapleton died as a result of the bludgeoning that occurred while she was in the van, or

by further bludgeoning inflicting on her by Petitioner once they were in the junkyard. The condition of the body and its state of dress indicates that Petitioner committed or attempted some sexual act with the victim's body.

After depositing Ruby Stapleton's body in the junkyard, Petitioner returned to the van and drove to a gas station where he purchased some gas. He drove from the gas station to East 55th and Truscon, where he abandoned Devon Stapleton by forcing him out of the van. (R. 263) Devon was found at the above location by Clyde Smith at about 12:20 a.m., Easter Sunday, April 19th.

Mr. Smith, for some unknown reason, awoke in the middle of the night and decided to take a drive. Fortuitously, he came upon Devon Stapleton at the above location crying for his mother. Mr. Smith picked up Devon and took him to his home. He called the Cleveland Police to report finding Devon. He also learned the address and phone number of Devon's stepfather (Anthony Massengale) and phoned him regarding Devon. His wife (Anita Smith) then noticed a shiny substance on Devon's coat. Mr. Smith touched it and found it to be blood. (Devon's coat was not saved for evidence. It was turned over to family, whereupon it was washed). Devon told Mr. Smith that the blood was his mother's (R. 261); and that a man had thrown him out of a van. (R. 263) Mr. Smith re-phoned the Cleveland Police, notifying them of the blood on Devon's jacket. The police responded and took custody of Devon.

On April 26, 1987, at about 3:20 p.m., Cleveland Police Officer Patrick Gillissie and his partner arrested Petitioner, Reginald Jells, in the van he used to kidnap and murder Ruby

Stapleton. The arrest was based on the license number received from Camilla Banks. The van was confiscated for processing. After processing Petitioner's van, bloodstains found in the van were determined to be those of the victim, Ruby Stapleton.

(R. 375-379)

On April 27, 1987, Cleveland Police Officer Verlin Peterson received information from his sister, Janice Abernathy (also a Cleveland Police Officer) concerning the disappearance of Ruby Stapleton. Officer Peterson recalled that he had found a woman's body in a certain junkyard before, in 1979.

On April 28, 1987, at about 5:30 p.m., Officer Peterson went to that same junkyard, at East 84th Street and Grand Avenue in Cleveland, Ohio, where he found the body of Ruby Stapleton. The body of Ruby Stapleton was partially clad, with her panties pulled down and still wearing the pink blouse the witnesses saw her wearing when she was kidnapped.

Found on the scene where the body was discovered was a piece of cardboard with a muddy shoeprint on it (State's Exhibit 6-A-1). (R. 310-312) The shoeprint on the cardboard was compared with Petitioner's right black tennis shoe.. The print on the cardboard was found to have been made by Petitioner's right black tennis shoe. (R. 357)

Additional processing of Petitioner's van revealed:

Latent fingerprints were found in the van. Some of the prints belonged to Petitioner (R. 314, 316-318); the others could not be compared with those of Ruby Stapleton because of the advanced state of decomposition of her body. (R. 314-315)

A transmission jack was found in Petitioner's van. (R. 318-319) The top of the transmission jack matched the marks found on the victim's body. (See State's Exhibits 3-X-1; 3-X-2; 3-X-3; 3-X-4; and 3-X-5).

Petitioner's pants (State's Exhibit 9-A) and Petitioner's tennis shoes (State's Exhibit 9-C) were examined and were found to be stained with human blood. (R. 369-371)

A tennis shoe print was found on the inside of the van's windshield. (R. 322-326) The shoeprint was compared with the victim's left tennis shoe and was found to have been made by the shoe. (R. 354-355)

Based on all of the above, Petitioner was tried by a three-judge panel and on August 31, 1987, was convicted of Aggravated Murder with a specification for kidnapping, the kidnapping of Ruby Stapleton and the kidnapping of Devon Stapleton. On September 18, 1987, after a sentencing hearing on the death penalty provision, the defendant was sentenced to death.

REASONS FOR DENYING THE WRIT

1. No Error is Committed Where the Record Shows a Defendant Knowingly, Intelligently and Voluntarily Waives his Right to a Jury Trial and Elects to be Tried by a Three-Judge Panel.

Petitioner's Proposition of Law No. I is the same as his Proposition of Law No. I filed with the Ohio Supreme Court.

Under Ohio law, a defendant charged with a capital offense has the choice of electing between a jury trial and a three-judge panel.

In this case, Petitioner was well-represented and counseled by two competent trial attorneys whose efforts are not challenged herein.

The record shows that Petitioner knowingly and intelligently waived his right to a jury, orally and in writing. Furthermore, Petitioner voluntarily elected to be tried by a three-judge panel.

The State of Ohio does not contest the law relevant to this issue. The State's position is that the facts in the trial record show that the petitioner knew and understood his right to a jury trial, that he voluntarily waived his right and elected to be tried by a three-judge panel. The recorded facts meet the legal requirements of a jury waiver.

The Ohio Supreme Court in State v. Jells (1990), 53 Ohio St. 3d 22, at 24-26, ruled:

In his first proposition of law, appellant argues that his waiver of his right to trial by jury was constitutionally insufficient because the trial court did not conduct a more thorough inquiry to determine whether the waiver was intelligent, voluntary and knowing. See Crim. R. 23(A); R.C. 2945.05. We note initially that this proposition of law was not raised in the Court of Appeals and hence the plain error standard of review of Crim. R. 52(B) is applicable to our consideration. Plain error does not exist unless it can be said that but for the error, the outcome below would clearly have been otherwise. See State v. Long (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 178, 372 N.E. 2d 804, paragraph two of the syllabus; State v. Greer (1988), 39 Ohio St. 3d 236, 252, 530 N.E. 2d 382, 401.

Under R.C. 2929.03(C)(2)(a) and R.C. 2945.06 a defendant in a death penalty prosecution may waive his right to a trial by jury and have his case heard before a three-judge panel. R.C. 2945.05, the general statute concerning jury waivers, prescribes language that should be used in waiving a jury trial. In the case at bar, the waiver form signed by the appellant conformed to the language contained in R.C. 2945.05. Specifically, the form stated:

I, REGINALD JELLS, the defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by three judges of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury.

The statement was signed by appellant and two of his attorneys as witnesses.

Appellant asserts that the inquiry conducted by the court was inadequate to determine whether an intelligent, voluntary, and knowing waiver was made. Appellant points to the following colloquy:

THE COURT: Reginald, is that your signature?

THE DEFENDANT: Yes, it is, sir.

THE COURT: You did this of your own free will?

THE DEFENDANT: Yes, I did.

THE COURT: Nobody forced you to do this?

THE DEFENDANT: No, sir.

THE COURT: All right.

MR. HUBBARD [defense counsel]: I have witnessed his signature, your Honor.

THE COURT: This will be made part of the record.

Appellant cites this court's opinion in State v. Ruppert (1978), 54 Ohio St. 2d 263, 271, 8 O.O. 3d 232, 237, 375, N.E. 2d 1250, 1255, certiorari denied (1978), 439 U.S. 954, as authority for his position that the trial court in this case failed to determine whether his waiver was properly made. We find Ruppert not to be on point. In Ruppert the defendant was misinformed by the trial judge that if he waived a jury trial the three-judge panel would have to unanimously find him guilty when all that was required was a majority decision. The court held that since the defendant was misinformed his waiver was not intelligent, voluntary, and knowing. Id., at 272, 8 O.O. 3d at 237, 375 N.E. 2d at 1255-1256. Here, there is no allegation by the appellant that the trial court misinformed

him of his rights concerning the execution of the waiver form.

There is no requirement in Ohio for the trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel. See State v. Morris (1982), 8 Ohio App. 3d 12, 14, 8 OBR 13, 15-16, 455 N.E. 2d 1352, 1355. While it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, there is no error in failing to do so. Since the executed waiver in this case complied with all of the requirements of R.C. 2945.05, and counsel was present at the signing of the waiver, we find no error.

Accordingly, we find no error, plain or otherwise, and appellant's first proposition of law is not well-taken.

The State of Ohio asks that a Writ not be granted on this issue.

II. No Error Exists Where the Facts Show that Proper Line-Up and Photo Array Procedures were Followed, or that Independent Sources of Identification Enabled Witnesses to Identify the Defendant, Notwithstanding the Photo Array or Line-Up Procedure.

Petitioner's Proposition of Law No. II submitted in support of his reason for granting the Writ is a compilation of his Propositions of Law Nos. IV, V, and VI submitted to the Ohio Supreme Court.

A. Photo Array

The portion of the transcript that is relative to this issue is R. 400 to 411. At R. 464, the court overruled the

defense motion to suppress the identification of Petitioner as it relates to all witnesses.

The basis for the witnesses' ability to identify the petitioner is founded in the fact that they saw the petitioner as he committed various acts in their presence. They were not influenced by the photo arrays (Def. Ex. C and E) nor the lineup. Their ability to identify the petitioner was based solely on their independent recollection of the acts committed in their presence.

In Neil v. Biggers (1972), 409 U.S. 188, at 199, the U.S. Supreme Court suggested some factors to be considered regarding this issue:

We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

It is obvious from Devon Stapleton's testimony (R. 83-123) that his in-court identification of the petitioner was based on his memory and recollection of seeing the petitioner murder his mother. Devon and the victim were in the petitioner's van for a period of time before the victim fled the van at the intersection of Euclid Avenue and Lakeview in Cleveland, Ohio. He described and identified the van used by the petitioner. (R. 84, 98, 99) He saw the petitioner grab his mother after she fled the van,

and put her back in the van. (R. 85) He watched the petitioner get into the van and drive away with his mother and him. (R. 86) He saw and described the metal object the petitioner used to bludgeon his mother to death. (R. 86-87) While his mother was being bludgeoned to death by the petitioner, Devon saw the blood on his mother and he saw the blood splatter on him. (R. 87-88) He observed that the petitioner knocked his mother unconscious. (R. 88) He recalled that the petitioner drove to a junkyard, took his mother out of the driver's door of the van, and carried her into the junkyard. (R. 89-90) He remembered that the petitioner came back from the junkyard, drove to a gas station, and later dropped Devon off on some street. (R. 91-92)

During these events, Devon Stapleton had an extended period of time within which to view the petitioner. The acts committed by the petitioner in his presence were of such a memorable nature that they had had his undivided attention. Devon's certainty of identification both in court (R. 94) and during the photo identification (R. 405-406) indicated that he was able to identify the petitioner because he saw the petitioner commit the acts he described. The nine day lapse between the crimes (April 18, 1987) and the photo identification (April 27, 1987) was not prejudicial, either to the petitioner or to Devon's ability to describe the petitioner (R. 406) and the events surrounding his mother's murder are corroborated by other eyewitnesses, scientific evidence, and physical evidence.

Owen Banks' testimony (R. 127-160) corroborates and adds credibility to the testimony of Devon Stapleton. He saw the

incident and described it the same as Devon Stapleton did (R. 128-131); and identified the petitioner (R. 132) as the man who abducted Devon and his mother. He told his daughter to write down the license number of the petitioner's van (R. 129), which she did. (R. 223) He personally identified the petitioner's van.

(R. 134) Mr. Banks not only saw the petitioner struggling with the victim (R. 129), he went up to the petitioner -- face-to-face -- (R. 133), and confronted him to the point that the petitioner tried to explain his conduct by suggesting the victim was just drunk. (R. 131)

Mr. Banks' in-court identification was based on his witnessing the petitioner abduct Devon and his mother. It was not tainted by the photo identification. He described the photo identification (R. 134) and noted that, although he was shown other photos, he recognized the petitioner "right off". (R. 134)

Both Devon's testimony and that of Owen Banks is further substantiated by Edward Wright. (R. 161-194) He observed the incident at Lakeview and Euclid, and identified the petitioner as being the man who abducted Devon Stapleton and his mother. (R. 168) He also identified the petitioner's van as the one used by the petitioner during the kidnapping. (R. 165)

Camilla Banks also identified the petitioner as having kidnapped Devon Stapleton and his mother. (R. 225)

The evidence is uncontested that all the witnesses had an unobstructed view of the petitioner and his conduct; that they all are certain their in-court identification based solely on their memory of watching the petitioner kidnap Devon Stapleton and his

mother; that the lighting was good; and the circumstances under which they viewed the petitioner, and their in-court testimony, were uninfluenced by any method of police investigative identification.

Based on the law relevant to this issue and the facts contained in the trial record, it is clear that the trial court did not err in overruling the defense motion to suppress the in-court identification of the petitioner by Devon Stapleton, Owen Banks, Camilla Banks and Edward Wright. The law enunciated in Neil v. Biggers, supra, as applied to these facts shows that each witness had an independent means of in-court identification of the petitioner and were not influenced by any investigative procedure.

In its opinion, the Ohio Supreme Court stated, State v. Jells (1990), 53 Ohio St. 3d 22, at 26-28:

II

In his fourth and sixth propositions of law, appellant contends that the photographic array shown to certain witnesses, for purposes of identification, was unduly suggestive and violated several of appellant's state and federal constitutional rights.

A

First, appellant begins by asserting that the admission of the testimony of five year-old Devon Stapleton was improper because he was unable to independently and truthfully relate facts and he was shown an unduly suggestive photographic array.

Evid. R. 601 sets forth the standards for determining the competency of a child as follows:

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly* * *[.]

In State v. Boston (1989), 46 Ohio St. 3d 108, 114, 545 N.E. 2d 1220, 1228, this court, noted that "Evid. R. 801(A) contemplates that to be competent, a witness must be able to receive a just impression of the facts, be able to recollect those impressions, be capable of communicating those impressions to others, and must understand the obligation to be truthful."

Prior to Devon's testimony, the court held a competency hearing. During the voir dire, Devon testified that he knew that it was good to tell the truth and bad to tell a lie. Devon showed his ability to relate and recall facts by testifying about the circumstances of his mother's death. During his substantive testimony, Devon again proved he was able to testify by describing the facts surrounding the abduction, including the appellant's use of a van, the object used to hit his mother, the junkyard where his mother's body was discarded, and the events that took place after he was dropped off by appellant. Both the voir dire and the substantive testimony of Devon show that he was qualified to testify; therefore, the trial court did not abuse its discretion in allowing him to do so. See, e.g., State v. Adams (1980), 62 Ohio St. 2d 151, 157, 16 O.O. 3d 169, 173, 404 N.E. 2d 144, 149 ("[t]he term 'abuse of discretion' connotes more than an error of law or of judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable.")

B

Still within his fourth proposition of law, appellant alleges error with respect to the photographic array shown to Devon, in view of his age and impressionability. The array consisted of five photographs, four of other men, taken indoors, and one of appellant's taken outdoors. Appellant claims that the photograph of him was dark, and his features were nearly indistinguishable. Both Owen Banks and Devon Stapleton selected appellant's photograph from the array, and subsequently identified him in court.

In order to suppress identification testimony, there must be " * * * a very substantial likelihood of irreparable misidentification." Simmons v. United States (1968), 390 U.S. 377, 384; accord State v. Perryman (1976), 49 Ohio St. 2d 14, 3 O.O. 3d 8, 358 N.E. 2d 1040, vacated on other grounds (1978), 438 U.S. 911. In Neil v. Biggers (1972), 409 U.S. 188, 199-200, the United States Supreme Court set forth the following factors to be considered in examining an identification procedure and its impact.

" * * *[W]ether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.* * *"

The focus under the "totality of the circumstances" approach is upon the reliability of the identification, not the identification procedures. State v. Lott (1990), 51 Ohio St. 3d 160, 175, 555 N.E. 2d 293, 308; Manson v. Brathwaite (1977), 432 U.S. 98, 114 ("* * *reliability is the linchpin in determining the admissibility of identification testimony* * *"); State v. Moody (1978), 55 Ohio St. 2d 64, 67, 9 O.O. 3d 71, 72, 377 N.E. 2d 1008, 1010 ("[a]lthough the identification procedure may have contained notable flaws, this factor does not per se, preclude the admissibility of the subsequent in-court identification.")

In applying the criteria set forth in Biggers it is clear to this court that there was sufficient independent opportunity for Devon to view the appellant. Specifically, Devon and the victim had been in the appellant's van for a period of time before they fled the van at the intersection of Euclid Avenue and Lakeview. Devon saw appellant grab his mother after she fled the van, and put her back into the van. Devon himself was picked off the sidewalk and put back into the van. He witnessed the

bludgeoning of the victim by the appellant. During these events, Devon had an extended period of time within which to view the appellant. Further, Devon indicated that he was able to identify the appellant because he saw appellant commit the acts he described. Although appellant claims there were some inconsistencies with Devon's testimony, we find upon review of the entire transcript that he gave a generally accurate eyewitness account. Devon's testimony was not necessarily inconsistent and certainly not indicative of an unreliable witness. See State v. Moody supra, at 69, 9 O.O. 3d at 74, 377 N.E. 2d at 1011 ("[a]lthough there was some evidence of discrepancies on the part of the complainant in her identification of the appellant as her assailant, these questionable areas in complainant's description were particularly for the jury to decide."). Therefore, we find no error with the photographic array shown to Devon.

C

In his sixth proposition of law, appellant again attacks the same photographic array with respect to the identification made by Owen Banks. For the same reasons that Devon's identification is reliable, Owen Banks' identification is also reliable. Banks saw the same incident and described it virtually the same as Devon. Furthermore, he identified the appellant as the man who abducted Devon and the victim. Banks not only saw appellant struggling with the victim, but also went up to the appellant and confronted him regarding appellant's treatment of the victim. Banks even commented that, although he was shown other photographs, he recognized the appellant "right off". Thus, under the totality of the circumstances, the identifications of the appellant by Devon Stapleton and Owen Banks were reliable. Consequently, regardless of the validity of the identification procedures used by the state, the identification testimony of these witnesses at trial was properly admitted.

Accordingly, appellant's fourth and sixth propositions of law are overruled.

B. Line-Up

This issue relates to the testimony of Edward L. Wright (R. 161-194), and a lineup viewed by him. (R. 386-398) Neil v. Biggers (1972), 409 U.S. 188.

Mr. Wright, a security guard, saw the petitioner kidnap Devon Stapleton and his mother at the intersection of Lakeview and Euclid, Cleveland, Ohio. He saw, under good lighting conditions (R. 170), the victim screaming as she was being picked up by the petitioner and thrown into the van. (R. 163-164) He observed how the victim, Devon, and the petitioner were dressed. (R. 163, 165, 178) Mr. Wright identified the petitioner's van (R. 165) and the petitioner. (R. 168-169) Subsequently, Mr. Wright viewed a lineup and identified the petitioner. (R. 168)

Petitioner alleges that the lineup was suggestive because the petitioner was wearing a light blue jumpsuit and the others in the lineup had different civilian clothes.

That Mr. Wright was able to identify the petitioner based on his independent recollection of the petitioner's conduct, and uninfluenced by the police investigative lineup, is best shown by his testimony at R. 179, 180, 182, 183, 185, 186. Mr. Wright unequivocally displayed his ability to identify the petitioner based on his recollection of viewing the petitioner's conduct. He was so certain that the petitioner is the one who kidnapped Devon Stapleton and his mother that he identified him immediately in the lineup.

Based on the facts that showed Mr. Wright had an independent means of identifying the petitioner that was not influenced by any police investigative procedure, the court properly overruled the petitioner's motion to suppress the in-court identification.

The Ohio Supreme Court in State v. Jells, supra, at 30, ruled:

Appellant in his fifth proposition of law alleges that the lineup shown to witness Edward Wright was unduly suggestive and inherently unreliable. Appellant bases this proposition on the fact that, while the other men in the lineup were wearing street clothes, appellant was wearing prison garb, i.e., a jumpsuit.

In State v. Sheardon (1972), 31 Ohio St. 2d 20, 60 O.O. 2d 11, 285 N.E. 2d 335, paragraph two of the syllabus, this court held with respect to police lineups that:

"The due process clause of the Fifth and Fourteenth Amendments forbids any pre- or post-indictment lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification
* * *

See, also, Kirby v. Illinois (1972), 406 U.S. 682. A reviewing court should examine the factors surrounding the actual eyewitness incident to determine whether the witness is susceptible to suggestion, which would lead to an irreparable, mistaken identification. See Neil v. Biggers, supra.

In the case sub judice, Wright was able to describe the clothes that Devon and the victim wore. Wright was able to recognize that appellant's hair in court was shorter than it had been at the scene of the kidnapping. In applying the Biggers factors (see discussion at II B, supra), we find that Wright had ample opportunity to independently observe and identify appellant. Furthermore, he unequivocally displayed his ability to identify the defendant based on his recollection of the defendant's conduct. Accordingly, this proposition of law is not well-taken.

Based on the foregoing facts and law, the State of Ohio respectfully requests that the Writ not be granted.

- CONCLUSION

The Ohio appellate and Supreme Courts have properly reviewed and ruled on both issues presented herein. Petitioner has failed to raise and substantiate any constitutional issue or issue of great public interest not already correctly ruled on by the Ohio Supreme Court.

Based on the preceding law and facts, and the rulings of the Ohio Supreme Court, the State of Ohio respectfully asks that the Petition for Writ of Certiorari be denied.

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SERVICE

A copy of the foregoing Brief has been mailed this 16 day of January, 1991, to Joann Bour-Stokes, Ohio Public Defender Commission, 8 East Long Street - 11th Floor, Columbus, Ohio 43266-0587.

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NO. 90-6713

IN THE SUPREME COURT OF THE UNITED STATES
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ON PETITION FOR WRIT OF CERTIORARI
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AFFIDAVIT OF FILING

I, GEORGE J. SADD, being first duly cautioned and sworn, depose and say that I am a member of the bar of this Court and otherwise competent to execute this affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the 16th day of January, 1991, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543,

one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

George J. Sadd
GEORGE J. SADD
Assistant Prosecuting Attorney
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Cleveland, Ohio 44113

SWORN to before me and subscribed in my presence this 16th day of January, 1991.

Mary Ann Roberts
NOTARY PUBLIC - Mary Ann Roberts
Recorded in Cuyahoga County
State of Ohio
My commission expires 1/12/95